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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-25, is reported at 3 F.3d 342.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. The petition for a writ of certiorari was filed on November 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of aggravated sexual abuse of a child, in violation of 18 U.S.C. 1153,

QUESTIONS PRESENTED

1. Whether out-of-court statements of a child sexual abuse victim were properly admitted at trial pursuant to Fed. R. Evid. 801(d)(1)(B).

2. Whether the victim was sufficiently subject to cross-examination to warrant admission of her out-of-court statements.

2241(c), and 2245(2)(A)-(C). He was sentenced to 144 months' imprisonment. The court of appeals affirmed. 3 F.3d 342-353.[1]

1. The evidence at trial showed that in June 1989 petitioner, a Navajo Indian, sexually assaulted his four-year-old daughter, A.T., by placing his penis in her vulva and mouth, by placing his fingers in her vulva, and by having contact between his mouth and her vulva. The attack took place on an Indian reservation while petitioner had custody of the child.

A.T. was born on June 18, 1985; petitioner and his wife, Beverly Padilla, were divorced in September 1988. After the divorce, the parents had joint custody of A.T., with petitioner having primary physical custody. Padilla had visitation rights and had custody of A.T. on weekends and holidays. Beginning in June 1989, petitioner and Padilla alternated two-week periods of custody of A.T. for the summer. Padilla picked A.T. up on June 16 and later celebrated A.T.'s birthday on June 18; A.T. had already had a small birthday party at petitioner's house. 3 F.3d at 344; Gov't C.A. Br. 2-3.

That same June, around the time of A.T.'s fourth birthday, petitioner undressed his daughter and himself. A.T. tried to cross her legs, but petitioner forced them apart. He then climbed on top of A.T. and penetrated her vulva with his penis. He also put his penis in A.T.'s mouth. After petitioner was fin-

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[1] The appendix to the petition for a writ of certiorari contains only the odd-numbered pages of the typescript opinion of the court of appeals. Consequently, we shall refer to the published opinion.

ished, A.T. went to the bathroom and wiped blood from her vaginal area. Gov't C.A. Br. 3.

A.T. did not tell her mother of the attack for more than a year. Under a modified custody order, Padilla had custody of A.T. for the summer of 1990, and she was living with Padilla and her new husband in Colorado Springs, Colorado. A custody review hearing was scheduled for August 24 in Shiprock, New Mexico. On August 22, the day before the family was going to drive to Shiprock, A.T. spoke to Lisa Rocha, her babysitter, and said, "Please don't let my mom take me back to my father." When Rocha asked why, A.T. responded, "Because my dad gets drunk and he thinks I'm his wife." Because Rocha was preoccupied with her own child at the time, A.T.'s words did not immediately register with her. After a few minutes, Rocha asked A.T. what she meant, but A.T. would not talk to her and instead ran off to play with other children. 3 F.3d at 345; Gov't C.A. Br. 4.

Beverly Padilla and A.T. missed the custody hearing in New Mexico because it had been rescheduled. On Sunday, August 26, Rocha telephoned Padilla, told her what A.T. had said on August 22, and asked Padilla to speak to A.T. The next morning Rocha telephoned Padilla and again urged her to speak to A.T. When A.T. would not speak to Padilla, Padilla asked Rocha to come to Padilla's house and talk to A.T. Gov't C.A. Br. 4-5.

When Rocha arrived, Padilla went into another room. Rocha asked what A.T. had meant about her father treating her like a wife. A.T. replied that her father did "nasties" to her. Rocha

asked her to explain. A.T. said that her father had dragged her by the arms into the bedroom, where he took off her clothes and put her on the bed. She said she had tried to keep her legs crossed, but her father had forced them open. He then lay on top of her, and she felt a sharp pain "down there," pointing to her abdomen.[2] A.T. also said she had wiped herself afterwards and there was blood on the tissue. 3 F.3d at 345; Gov't C.A. Br. 5.

Rocha and Padilla then contacted the police. On August 29, Child Protection Services caseworker Kae Ecklebarger interviewed A.T. Ecklebarger asked if A.T. knew why she was there; A.T. said that it was because of what "Matthew" had done to her. She said that petitioner had "put his balls" in her. Ecklebarger asked if A.T. could remember one specific time; A.T. said she could remember one time especially clearly. She said her father had told her to take off her clothes, but she had refused. Petitioner then removed her panties, put her on the floor, and "put his balls" in her. Ecklebarger brought out anatomically correct dolls and asked A.T. to show what petitioner had done. A.T. undressed the male doll and removed the panties from the girl doll, placed the girl doll on its back, and took the penis of the male doll and tried to insert it in the vaginal area of the girl doll. She then moved the male doll up and down on the girl doll. 3 F.3d at 346; Gov't C.A. Br. 5-6.

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[2] At trial, Padilla said she overheard A.T.'s statement that her father had pulled her legs apart. 3 F.3d at 346.

A.T. also said she had tried to keep her legs crossed. She got on the floor and demonstrated how petitioner had pulled her ankles up to her buttocks and forced her knees apart, and then had "put his balls" in her. She said petitioner had kissed her all over her body, including on her vaginal area, which she indicated by pointing to the girl doll. Petitioner had asked her to touch him, she said, but she had refused. When Ecklebarger asked her where petitioner had asked A.T. to touch him, she pointed to the penis on the male doll. A.T. also related that she had gone to the bathroom afterwards and had wiped herself, and there was blood. She kept the tissue and showed it to her grandmother and aunt, saying, "Look what Matthew did to me." A.T. said her grandmother later had confronted petitioner, who then turned to A.T. and said, "It's all your fault." A.T. said she had answered, "No, it isn't, it's all your fault." A.T. said her grandmother threatened petitioner, but he did not stop; instead, "he did it every single day and then he stopped." Gov't C.A. Br. 6; 3 F.3d at 346.

Ecklebarger then referred A.T. to Dr. Karen Kuper, a local pediatrician. Dr. Kuper questioned A.T. in order to determine what injuries had occurred. When Dr. Kuper asked whether anyone had ever touched her in a way that hurt or was scary, A.T. said, "Just my dad." When Dr. Kuper asked where her father had touched her, A.T. pointed to the vaginal area on an ordinary doll in Dr. Kuper's office. A.T. also said that petitioner had "put his fingers inside me." She said that had hurt and had scared her.

When Kuper asked whether petitioner had touched A.T. with anything else, A.T. replied, "His thing." She could not say what "his thing" was, but she pointed to the doll's genital area. Kuper asked what petitioner had done with his "thing"; A.T. said he had "put it inside of me," again pointing to the doll's vaginal area. 3 F.3d at 345-346; Gov't C.A. Br. 7-8.

Dr. Kuper then performed a physical examination on A.T. She concluded that A.T.'s vaginal opening was enlarged and that her hymenal tissue was abnormally thin. There was no indication of fresh trauma to the vaginal opening. Dr. Kuper opined that the size of the vaginal opening and the small amount of hymenal tissue was consistent with penetration of the vagina by an object such as a penis. The lack of fresh trauma indicated that there had been no penetration within recent months. Dr. Kuper also said that it would have required more than one penetration to cause both the enlarged vaginal opening and the lack of hymenal tissue. Gov't C.A. Br. 8; 3 F.3d at 346.

On September 21, 1990, A.T. saw Dr. Laura Reich, another pediatrician, for treatment of a rash on her thighs. A.T. told Dr. Reich that her father had put his "thing" in her. After learning that A.T. already had spoken to Social Services, Reich did not question her further. Reich then examined A.T. and determined that her hymen was not intact and that her vaginal opening was larger than normal. According to Dr. Reich, A.T.'s physical condition was consistent with penetration by an adult

penis, probably more than 10 times. 3 F.3d at 346; Gov't C.A. Br. 8-9.

Dr. Jean Spiegel, a pediatrician and expert in child sexual abuse, examined A.T. the next year, on September 3, 1991, in order to give a second opinion on A.T.'s physical condition. Spiegel conducted a vaginal examination and found that A.T. had a very thin rim of hymenal tissue and a large hymenal opening for her age. Spiegel's findings were consistent with chronic vaginal penetration. The penetration also was not recent; Dr. Spiegel could say only that it had occurred more than four to six months prior to her examination. Spiegel said that repetitive penetration by a penis, finger, or similar object could have caused the enlargement A.T.'s vaginal opening. Spiegel also spoke to A.T. outside her mother's presence. A.T. said her father had touched her breasts and "front privates," as well as her bottom. 3 F.3d at 346; Gov't C.A. Br. 9.

2. At trial, A.T. was the government's first witness. She was six and one-half years old at the time. The judge extensively questioned A.T. to determine whether she was competent to testify. The judge also permitted the prosecutor to make extensive the use of leading questions. Through her testimony and use of dolls, and by pointing to body parts, A.T. described the abuse by petitioner. A.T. was then subject to two days of cross-examination. Defense counsel suggested through cross-examination that A.T. missed her mother when she was not with her, was afraid

of returning to her father, and feared that her mother might go to jail. 3 F.3d 345, 347-349.

The government also presented as witnesses those individuals who had heard statements by A.T. about petitioner's abuse. Petitioner objected to the admission of A.T.'s out-of-court statements through those witnesses, but the district court overruled those objections. The district court admitted the statements to the three doctors under Fed. R. Evid. 803(4), the exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment, and under Fed. R. Evid. 801(d)(1)(B), which provides that an out-of-court statement is not hearsay if it is a prior consistent statement of a testifying witness and is offered to rebut an express or implied charge of recent fabrication.[3] The district court admitted A.T.'s statements to Rocha (as well as those overheard by Padilla) under Fed. R. Evid. 801(d)(1)(B). The government argued that the statements to Kae Ecklebarger were admissible under Fed. R. Evid. 803(24), the catch-all hearsay exception, because the statements were similar to those that are admissible under the medical-treatment exception; the court did not expressly state the ground for admitting the statements to Ecklebarger. The court admitted A.T.'s first statement to Rocha under the catch-all hearsay exception because the statement was similar to those admissible

[3] The court found that A.T.'s August 22 and August 27 statements were admissible to rebut the implication that A.T. had recently fabricated allegations of sexual abuse because she wanted to live with her mother rather than with her father. Gov't C.A. Br. 11-12.

under Fed. R. Evid. 803(3) for statements relating the declarant's existing state of mind. Gov't C.A. Br. 10-12.

3. On appeal, petitioner renewed his claims that A.T.'s out-of-court statements were not admissible. The court of appeals determined that all the statements were admissible under Rule 801(d)(1)(B), and did not reach the question of their admissibility under Rules 803(4) or 803(24). 3 F.3d at 347.

The court of appeals rejected petitioner's claim that A.T. was not subject to cross-examination concerning her prior statements about sexual abuse, as is required by Rule 801(d)(1)(B). 3 F.3d at 347-349. The court concluded that "[a]lthough A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions," and petitioner failed to "identify any specific topic or issue about which A.T. would not respond." Id. at 348-349. The court of appeals also found that petitioner clearly had implied through cross-examination that A.T. had fabricated the sexual abuse allegations in order to remain with her mother. Id. at 349.

Finally, the court of appeals concluded that A.T.'s prior statements did not have to predate the purported motive to fabricate in order to be admissible under Rule 801(d)(1)(B). 3 F.3d at 349-351. The court viewed the issue of whether the prior statements were made before the alleged motive arose "as a function of the relevancy rules, not the hearsay rules." Id. at 350. While the timing of the motive is a "crucial" factor in assessing

relevancy, the court explained, the determination of the probative value of the prior statement must be made in light of "the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." Ibid. In this case, the court found that "A.T.'s consistent prior statements do carry probative force apart from mere repetition," and that the district court did not abuse its discretion in admitting them." Id. at 351.[4]

ARGUMENT

1. Petitioner contends (Pet. 8-15) that the court of appeals erred in admitting A.T.'s prior consistent statements under Fed. R. Evid. 801(d)(1)(B) without requiring a showing that the statements were made before any motive to fabricate arose. He also argues that the court's decision conflicts with decisions of other courts of appeals. The court of appeals correctly rejected petitioner's contention that Rule 801(d)(1)(B) requires that the prior consistent statement must predate the motive to fabricate, and the claimed circuit conflict does not warrant this Court's review.

a. Rule 801(d)(1)(B) provides that an out-of-court statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the

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[4] The court of appeals also rejected petitioner's claims that the admission of A.T.'s prior statements violated the Confrontation Clause, 3 F.3d at 351-352, that the district court improperly permitted the prosecutor to use leading questions in examining A.T., id. at 352-353, and that cumulative error required reversal, id. at 353. Petitioner does not renew those claims here.

statement, and the statement is * * * consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence." As petitioner acknowledges (Pet. 8), the text of the Rule contains no requirement that the prior statement be made before the purported motive to fabricate arose. In the absence of such a textual requirement, there is no basis for reading into the Rule a prerequisite to its application that the drafters did not provide. When it enacted the Federal Rules of Evidence, Congress "presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted." United States v. Salerno, 112 S. Ct. 2503, 2507 (1992); id. at 2508 (declining invitation to "ignore" the "language of Rule 804(b)(1)").

Although Rule 801(d)(1)(B) does not require that the prior statement be made before the motive to lie arose, the timing of the statement bears on its relevance. Rule 801(d)(1)(B) provides an exception to the hearsay rule, but it does not automatically justify admitting a statement. The statement must still be relevant pursuant to Fed. R. Evid. 402, and its probative force must outweigh its potential for prejudice under Fed. R. Evid. 403. A prior consistent statement made under the influence of the same motive to lie may be found irrelevant or otherwise inadmissible, since "mere repetition does not imply veracity." 3 F.3d at 350, quoting United States v. Harris, 761 F.2d 394, 399

(7th Cir. 1985). The evaluation of that issue is not a function of Fed. R. Evid. 801(d)(1)(B), which does not address the issue, but is a funcion of the relevancy provisions.

b. In declining to impose a strict requirement under Rule 801(d)(1)(B) that the motive to lie must arise after the time of the prior statement, the court of appeals in this case joined the majority of courts of appeals that have considered the issue. See United States v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992); United States v. Miller, 874 F.2d 1255, 1272 (9th Cir. 1989); United States v. Pendas-Martinez, 845 F.2d 938, 942 (11th Cir. 1988); United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); United States v. Parry, 649 F.2d 292, 296 (5th Cir. 1981). See also 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(1)(B)[01], at 801-201 (1993).

A minority of the circuits, however, have articulated the view under Rule 801(d)(1)(B) that "as was the situation under the law of evidence prior to the adoption of the Federal Rules of Evidence * * * the proponent must demonstrate that the prior consistent statement was made prior to the time the supposed motive to falsify arose." United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978). Accord United States v. Bowman, 798 F.2d 333, 338, cert. denied, 479 U.S. 1043 (1987); United States v. Henderson, 717 F.2d 135, 138 (4th Cir. 1983), cert. denied, 465

U.S. 1009 (1984); United States v. Feldman, 711 F.2d 758, 766 (7th Cir. 1983).[5]

Although the courts of appeals have taken different positions on the issue, this Court's intervention is not required. In most cases, the different interpretations of Rule 801(d)(1)(B) will not lead to different results, because the minority approach is founded on a principle of relevance that is also incorporated into the majority rule. As the Second Circuit explained in United States v. Quinto, under the law of evidence before the adoption of the Federal Rules of Evidence, a prior statement must have been made before the motive to fabricate arose, because "[o]nly then was the prior consistent statement 'relevant' on the issue of credibility." 582 F.2d at 233. The Second Circuit held that "[t]he standards for determining whether prior consistent statements can now be admitted as substantive evidence are precisely the same as the traditional standards." Ibid. Most courts following the majority rule also make the issue of prior motive an important consideration in evaluating the relevance of a prior statement. The court in this case made that clear, see 3 F.3d at 350 (prior motive a "crucial" factor in measuring rele-

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[5] Two circuits have reserved the issue. See United States v. Casani, 950 F.2d 893, 905-906 (3d Cir. 1991); United States v. Piva, 870 F.2d 753, 758 (1st Cir. 1989). Petitioner contends (Pet. 9) that the Ninth Circuit adopted the minority rule in United States v. Smith, 893 F.2d 1573, 1581 (9th Cir. 1990). In United States v. Payne, 944 F.2d 1458, 1470-1472 (9th Cir.), cert. denied, 112 S. Ct. 1598 (1992), however, that circuit made clear that it had held in Miller that there is no requirement under Rule 801(d)(1)(B) that the prior statement be made before the motive to lie, and that it was adhering to that rule.

vance), as have other circuits, see United States v. Montague, 958 F.2d at 1098; United States v. Miller, 874 F.2d at 1274 ("very crucial factor"); United States v. Lawson, 872 F.2d 179, 182 (6th Cir. 1989) (noting that prior statement is "more likely" to be probative when it preceded the motive to lie). While the majority rule provides a degree of flexibility that may be missing from the minority approach, the two approaches produce consistent rulings in most cases.[6]

There is no showing at this time that use of the two approaches is giving rise to significant differences in outcome in different circuits. For example, it is far from clear that A.T.'s out-of-court statements would have been barred under the minority approach. As the court of appeals noted, while A.T. conceivably had some motive to fabricate petitioner's abuse in order to stay with her mother, the contention that the prior statements were motivated by that desire "would require us to believe that A.T.'s statements were the result of a calculated scheme to deceive," and petitioner "presented no evidence that the five-year-old A.T. possessed the ability to appreciate the

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[6] Moreover, at least two courts following the minority approach have diluted its force by holding that even when a prior consistent statement is inadmissible under Rule 801(d)(1)(B) because the motive to lie existed when the statement was made, the prior statement may still be admissible to rehabilitate the witness after a challenge to the witness's credibility. See United States v. Brennan, 798 F.2d 581, 587-589 (2d Cir. 1986); United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985). In United States v. Miller, 874 F.2d at 1273, the Ninth Circuit characterized that distinction as "creat[ing] an end run around Rule 801(d)(1)(B) in order to blunt the apparent harshness of the [no motive] requirement."

cause relationships inherent in the conception and implementation of such a scheme."[7] 3 F.3d at 351. Under those circumstances, courts following the minority approach might well have found petitioner's claim of prior motive too speculative to require exclusion of A.T.'s statements. See United States v. Cherry, 938 F.2d 748, 756 (7th Cir. 1991) ("Mr. Cherry's second argument -- that [the child sex abuse victim] already had a motive to fabricate when she talked to Levine -- is highly speculative and is not supported by the evidence.").

c. In any event, the admissibility of the most significant out-of-court statements in this case does not depend on whether the majority rule or the minority rule under Rule 801(d)(1)(B) is applied. There were other evidentiary bases for admitting the most elaborate of A.T.'s out-of-court statements, and the remaining statements were merely cumulative of that evidence. A.T.'s most thorough descriptions of her father's sexual abuse were related by Dr. Kuper and Caseworker Kae Ecklebarger. In addition to finding that Dr. Kuper's testimony was admissible under Rule 801(d)(1)(B), the trial court admitted that testimony under Rule

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[7] Petitioner errs in arguing (Pet. 13) that it was inconsistent for the court of appeals to find that petitioner had charged recent fabrication, while suggesting that the five-year-old A.T. lacked the capacity to act on the motive to fabricate charged by petitioner. The issue of whether petitioner made the charge of fabrication depends on what lines of cross-examination he pursued; the issue of whether a motive to fabricate could plausibly explain statements made a year or more before trial depends on the capability of the child victim to fabricate at that time and the likelihood that the child would have fabricated a story incriminating petitioner at the time rather than later, in anticipation of her testimony in court.

803(4), the medical-treatment-or-diagnosis exception to the hearsay rule. That determination was correct.

Dr. Kuper testified that she took A.T.'s medical history in order to help ascertain what injuries had occurred, and that A.T.'s statements were helpful to Kuper's diagnosis of A.T.'s condition. Dr. Kuper explained that she had been trained in how to deal with cases involving sexual or physical abuse of children, and that she watches very closely for evidence of coaching by a parent. To check whether a child is fabricating, she observes also whether the child answers questions easily and in a forthright manner and whether the physical examination corroborates the history related by the child. Gov't C.A. Br. 8 n.4. A.T. testified that she recognized that Dr. Kuper's role was to "help kids," which indicates that A.T. understood that it was in her interest to be candid in the matters she described -- the rationale underlying the medical-treatment exception. See White v. Illinois, 112 S. Ct. 736, 743 (1992); Ring v. Erickson, 968 F.2d 760, 762 (8th Cir. 1992).[8] Given that foundation, the district court did not abuse its discretion in admitting Dr. Kuper's statement under Rule 803(4). Accord United States v. George, 960 F.2d 97, 99-100 (9th Cir. 1992); United States v. Provost, 875 F.2d 172, 177 (8th Cir.), cert. denied, 493 U.S. 859 (1989); United States v. Cherry, 938 F.2d at 757.

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[8] A.T.'s identification of her abuser was also admissible under Rule 803(4), because in cases of child abuse it is necessary to identify the abuser in order to prevent recurrence of injury. United States v. Renville, 779 F.2d 430, 437-438 (8th Cir. 1985).

Although the district court did not give the basis for its admission of A.T.'s statement's to Ecklebarger, that testimony likewise was admissible under Rule 803(4) for the same reason that Dr. Kuper's testimony about medical history was admissible under that rule. Ecklebarger was a highly trained social worker who was an expert in child abuse cases and in interviewing victims (Tr. 313-314, 333-335, 353-355). She conducted her interview of A.T. outside Padilla's presence, and she was careful not to ask leading questions (Tr. 315-316). Ecklebarger also spoke to A.T. about the concept of telling the truth. Although she did not use that specific term but rather spoke about the difference between stories and what really happened (Tr. 337, 355-356), Ecklebarger nonetheless impressed upon A.T. the importance of telling the truth. Finally, the purpose of her interview was to diagnose whether A.T. had suffered abuse (see Tr. 326-327, 353-354). A victim's statements about child abuse to a social worker in such circumstances fall within Rule 803(4). United States v. Balfany, 965 F.2d 575, 581 (8th Cir. 1992); United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987).

A.T.'s remaining out-of-court statements were much briefer and not nearly as explicit as her statements to Kuper or Ecklebarger, and at least one them was also admissible on evidentiary bases other than Rule 801(d)(1)(B).[9] Since Kuper's and

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[9] A.T.'s first statement to her babysitter, asking the babysitter not to let A.T.'s mother return her to her father because he "thinks I'm his wife," was also admissible under Rule 803(3) as a statement of present, then-existing fear. If that statement did not meet the requirements of Rule 803(3), then, as

Ecklebarger's testimony was properly admitted under Rule 803(4) and the remaining statements were cumulative and provided far less impressive evidence of abuse, the application of Rule 801(d)(1)(B) to A.T.'s other out-of-court statements has no significance for the outcome of this case. At worst, the admission of that evidence would constitute harmless error.

2. Petitioner also argues (Pet. 15-19) that A.T.'s out-of-court statements were improperly admitted because she was effectively unavailable for cross examination within the meaning of Rule 801(d)(1)(B). The court of appeals, in a careful and thorough opinion, correctly resolved that issue against petitioner, and there is no reason for further review of his factbound claim.

A.T. testified and was cross-examined for two days. On the first day, she answered all the questions defense counsel asked of her, which were background questions. The second day of cross-examination was more difficult. A.T. did not respond to 66 of 249 questions, though she did eventually respond to the substance of all of defense counsel's questions. 3 F.3d at 348. She also answered counsel's questions about her allegations of abuse and to whom she may have reported the abuse. In some instances she acknowledged or denied making statements; in others she said she did not remember. It sometimes took repetitive inquiry to get A.T. to respond, but the district court pointed

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the district court found, it was admissible under Rule 803(24) because it was similar to statements admitted under Rule 803(3).

out that defense counsel's questions might have been too complicated for A.T., who was six and one-half years old at the time of trial. Ibid.

The court of appeals concluded that under the circumstances, A.T. was sufficiently subject to cross-examination concerning her prior statements to satisfy the requirements of Rule 804(b)(1)(B). 3 F.3d at 348-349. The court noted that although A.T. initially was reluctant to answer some questions, she did ultimately answer most questions. The court said that "[o]ur reading of the record reveals that A.T. responded to simple and specific questions about specific persons. Indeed, [petitioner] does not identify any specific topic or issue that he feels was important but about which A.T. would not respond." Id. at 349.

As this Court has recognized, "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." United States v. Owens, 484 U.S. 554, 461 (1988). Here, A.T. responded to petitioner's questions sufficiently to allow the jury to observe her demeanor and to weigh her credibility. United States v. Spotted War Bonnet, 933 F.2d 1471, 1474-1475 (8th Cir. 1991), cert. denied, 112 S. Ct. 1187 (1992). This was not a case, such as United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986), where the child witness was unable to testify meaningfully at trial. Instead, as the court of appeals found, A.T. eventually responded to all lines of inquiry that petitioner's counsel raised. As even her failure to respond to questions when they

were first asked had value for the cross-examination, as it could be used to suggest that the witness was unable to provide satisfactory answers on key points relating to testimony and prior statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1994